LAW OFFICES
KOTEEN & NAFTALIN, L.L.P.
1150 CONNECTICUT AVENUE
WASHINGTON, D.C. 20036-4104

BERNARD KOTEEN*
ALAN Y. NAFTALIN
ARTHUR B. GOODKIND
GEORGE Y. WHEELER
MARGOT SMILEY HUMPHREY
PETER M. CONNOLLY
CHARLES R. NAFTALIN
JULIE A. BARRIE
* SENIOR COUNSEL

TELEPHONE
(202) 467-5700
TELECOPY
(202) 467-5915

DOCKET FILE COPY ORIGINAL

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

September 17, 1999

Magalie Roman Salas, Esq.
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, SW - Room A325
Washington, DC 20556

Re: WT 99-263, DA 99-1458

Dear Ms. Salas:

Herewith transmitted, on behalf of United States Cellular Corporation, are an original and four copies of its "Motion To Accept Late Filed Comments" and "Comments" in the above-referenced proceeding.

In the event there are any questions concerning this matter, please communicate with this office.

Sincerely,

Peter M. Connolly

Enclosures

cc: Susan Kimmel, Esq. (2 copies)
FCC - Policy Division
ITS

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Petition of the Wireless Consumers Alliance, Inc. For a Declaratory Ruling Regarding Communications Act Provisions and FCC Jurisdiction Regarding Preemption of State Courts from Awarding Monetary Damages Against Commercial Mobile Radio Service Providers for Violation of Consumer Protection or Other State Laws	)	WT 99-23

MOTION TO ACCEPT LATE-FILED COMMENTS

United States Cellular Corporation ("USCC") hereby requests that the FCC accept for filing the attached Comments, which were originally due on September 10, 1999. USCC owns and/or operates cellular systems in over 140 markets, including three markets in California, the state in which the lawsuit which gave rise to this proceeding is pending. USCC accordingly has a considerable stake in the outcome of the proceeding, which focuses on the relationship between state and federal laws in the regulation of CMRS.

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I. The Commission Should Grant This Motion

USCC asks that the FCC accept these late-filed comments, because the extraordinary number of important "wireless" proceedings now pending before the Wireless Telecommunications Bureau have prevented their timely filing. The time commitments required for those proceedings have made it impossible for USCC to prepare timely comments in this proceeding.

USCC and its counsel have had to cope with the demands of filing comments and then reviewing the comments filed on September 2 in the "Western Wireless" South Dakota preemption proceeding,[1] of filing comments on September 17, 1999 in the "calling party pays" proceeding,[2] and of filing, on September 14, 1999, comments on the report of CTIA and other parties concerning Phase I E-911 implementation.[3] USCC is also reviewing the recent reports and orders and notices of rulemaking issued in the "CALEA" and "tribal lands" proceedings.[4]

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[1] CC Docket No. 96-45, DA No. 99-1535

[2] WT Docket No. 97-207, Order Extending Comment and Reply Comment Periods, released August 6, 1999.

[3] Public Notice "Wireless Telecommunications Bureau Requests Comment on Wireless E911 Report filed by CTIA, PCIA, APCO and NASNA on August 9, 1999," DA 99-1627, released August 16, 1999.

[4] See In the Matter of Communications Assistance for Law Enforcement Act, CC Docket No. 97-213. Second Report and Order; Third Report and Order, FCC 99-229, FCC 99-230, released August 31, 1999; In the Matter of Extending Wireless Telecommunications

USCC has used the additional week to prepare comments which we believe will assist the Commission in resolving the issues before it in this proceeding. USCC also submits that no party will be prejudiced by the late filing, as we are hand serving counsel for the Wireless Consumers Alliance with the Comments today, which should give adequate time for review prior to the October 12, 1999 reply comment date.

CONCLUSION

For the foregoing reasons, USCC requests that the FCC accept the attached late-filed comments.

Respectfully submitted

UNITED STATES CELLULAR CORPORATION

By: Peter M. Connolly

Peter M. Connolly
Koteen & Naftalin, L.L.P.
1150 Connecticut Ave., N.W.
Washington, D.C. 20036

Its Attorneys

September 17, 1999

Service to Tribal Lands, Notice of Proposed Rulemaking, WT Docket 99-266, released August 10, 1999; In the Matter of Federal-State Joint Board on Universal Service: Promoting Deployment and Subscribership on Unserved and Underserved Areas, Including Tribal and Insular Areas, Further Notice of Proposed Rulemaking, CC Docket No. 96-65, released September 3, 1999.

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:	)	
	)	
Petition of the Wireless Consumers Alliance,	)	WT 99-263
Inc., for a Declaratory Ruling on	)	DA 99-1458
Communications Act Provisions and FCC	)	
Jurisdiction Regarding Preemption of State	)	
Courts from Awarding Monetary Damages	)	
Against Commercial Mobile Radio Service	)	
Providers for Violation of Consumers	)	
Protection or Other State Laws	)	

COMMENTS OF U.S. CELLULAR CORPORATION OPPOSING THE WIRELESS CONSUMER ALLIANCE'S PETITION

Eva Maria Wohn
Vice President, External Affairs
U.S. Cellular Corporation
8410 West Bryn Mawr, Suite 700
Chicago, Illinois 60639

Bret A. Dublinske
Dickinson Mackaman Tyler & Hagen, P.C.
1600 Hub Tower
699 Walnut Street
Des Moines, Iowa 50309

Peter M. Connolly
Koteen & Naftalin, L.L.P.
1150 Connecticut Avenue
Washington, D.C. 20036

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INTRODUCTION AND SUMMARY

In its Fourth Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services ("Fourth Annual Report"), the FCC overview of the market painted a glowing picture: the largest 12-month subscriber growth in the history of the sector; 26% penetration rate; 23% growth in the rate of increase of net-new subscribers per year; strong financial performance; increasing numbers of competitors per market; new, innovative services and hybrids including an increase in feature-laden digital services; wireless data; and wireless "last mile" services -- yet a significant decline in the average customer's monthly bill.

Since 1993, Congress and the FCC have taken a very light-handed approach to the regulation of commercial mobile radio services (CMRS). It is evident from the Fourth Annual Report that this approach is working, and working well. Wireless is one of the true success stories of the 1993 and 1996 amendments to the Federal Communications Act. It is no accident that wireless and the Internet share two common traits: they are among the fastest growing communications technologies, and they have both been governed by a "non-regulation" policy at the Congressional and FCC level. The Commission's strategic mix of careful but non-intrusive oversight, moderate regulation, and patience and encouragement for free-market mechanisms has proven to be extraordinarily successful, creating in the wireless industry a powerful engine for innovation, economic growth, job creation, and a higher level of communications convenience for millions of Americans.

The petition filed by the Wireless Consumer Alliance ("Alliance") threatens to derail this engine, throwing it off the Commission's carefully-laid non-regulatory track. The Alliance's petition is part of its own strategic agenda in the underlying L.A. Cellular case. The basic thrust of the Alliance's suit against L.A. Cellular is this: L.A. Cellular apparently shows its "coverage area" on its coverage maps and advertisements as a solid block, presumably following the outlines of its

licensed area(s) — a practice common to many carriers. This accurately describes for customers the outer boundaries of their carrier's service territory, which may have implications for their rates, for roaming, etc. The coverage within that block is not uniform, however, and in fact some areas are "dead spots," an issue the Alliance has sworn to hold against the wireless industry in every way and every forum it can.[1] The Alliance claims that advertising must show with precision the "dead spots" in coverage or it violates consumer protection laws and exposes carriers to tort claims when customers are unable to obtain a signal at points within the solid coverage area block shown on the maps.

L.A. Cellular has, to date, successfully defended this suit by arguing that the money damages sought by the plaintiffs would be a measure of what a court finds the customers allegedly "overpaid" based on the carrier's coverage gaps — i.e. what the rate should have been based on the adequacy of the coverage received. As such, it is expressly preempted by 47 U.S.C. § 332(c)(3). The Alliance, on the other hand, seeks a blank check for states to tie CMRS in red tape, in regulations that vary not only from state-to-state, but from jury-to-jury within a single state. The Alliance's request would result in layperson juries second-guessing the expertise of the Commission on vital and highly specialized issues of industry economics and technological capabilities, with millions of dollars at stake. Such legal risks would chill innovation and carrier-to-client communications, and such financial risks would chill investment and raise costs.

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[1] See Wireless Consumers Alliance web site, www.wirelessconsumers.org/about_us.html. As of August 17, 1999, the site boasted that the Alliance "has recently expanded its role to participate in class action lawsuits." See also "WCA Says 'Dead Zones' Industry's Achilles' Heel," Wireless Week, May 17, 1999 ("[Alliance] will soon single out a carrier for a 'dead spot alert,' a WCA bulletin publicizing the operator's coverage holes.")

The Commission should decline this request for a Declaratory Ruling. It will not resolve the underlying controversy: the appeal in the California courts will remain alive. It will not foster certainty; it will instead open up a Pandora's Box of costly, inconsistent litigation. If the Commission does, however, choose to enter a Ruling, it should rule against the position of the Alliance and instead take this opportunity to reaffirm the importance of the goals it has often listed as guideposts for regulation of the wireless marketplace: uniformity, symmetry, encouragement of investment, and a preference for market — rather than regulatory — mechanisms. Accordingly, U.S. Cellular Corporation asks the Commission to find that money damage awards in state courts, like those the Alliance seeks in California, are preempted. Moreover, the Commission should address the demarcation point between preempted regulation of rate and entry, and non-preempted "terms and conditions." In doing so, the Commission should define rates and entry broadly to ensure that mobile wireless providers, whose transmission signals and mobile customers are not bound by state borders, are not hindered by balkanized rules and excessive, parochial regulations.

U.S. CELLULAR'S ARGUMENTS OPPOSING THE ALLIANCE'S PETITION AND SUPPORTING BROAD PREEMPTION

I. THE COMMISSION'S POLICY OF NON-REGULATION OF CMRS IS WORKING WELL, AND STRONGLY FAVORS PREEMPTION OF STATE LAW MONEY DAMAGE AWARDS

A. The Market-Oriented, Light-Handed Regulatory Approach Maintained by the Commission and Congress Since 1993 is Appropriate, Successful, and Should be Permitted to Continue Without Interference

In the 1993 Omnibus Budget Reconciliation Act, Congress took two steps which made very clear its stance toward regulation of the wireless communications marketplace: Congress expressly preempted state authority over mobile wireless service rates and entry into the marketplace[2], and then gave the FCC authority to forbear from applying or enforcing many types of federal common carrier regulations against CMRS.[3] As the Commission noted, Congress took these steps "to replace[] traditional regulation of mobile services with an approach that brings all mobile service providers under a comprehensive, consistent regulatory framework. . . ." Connecticut Dept. of Pub. Util. Control v. FCC, 78 F.3d 842, 845 (2d Cir. 1996)(citing the Commission's Second CMRS Report and Order). In response, the Commission established "the goal of ensuring that unwarranted regulatory burdens are not imposed upon any mobile radio licensees who are classified as CMRS providers. . ." Id. at 846. As the Commission stated in its First Annual Report, it had "systematically removed regulatory barriers [and]. . . This trend toward reduced regulation is continuing. . ." See First Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services.

As the Fourth Annual Report makes clear, this approach has proven successful. This intentional and deliberate decision to avoid heavy-handed regulation, however, is easily

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[2] See 47 U.S.C. § 332(c)(3)

[3] See 47 U.S.C. § 332(c)(1)

misinterpreted by others as a vacuum waiting to be filled. As it has successfully done with the Internet and information services, the Commission must remain vigilant as overzealous states and opportunistic trial attorneys attempt to fill this perceived vacuum.[4] Unfortunately, piecemeal and ad hoc regulation — and especially "regulation by litigation" — defeat a critical goal which the Commission elaborated in declining Louisiana's Petition to Retain Jurisdiction:

> Finally, Congress delineated its preference for allowing this emerging market to develop ***subject to only as much regulation for which the Commission and the states could demonstrate a clear-cut need.*** The public interest goal of this Congressional plan is readily discernable. Congress intended to promote rapid deployment of a wireless telecommunications infrastructure. Robust investment is a prerequisite to achieving that goal. Thus, in implementing the statute, we have attempted to facilitate the achievement of this goal by ensuring that regulation creates positive incentives for efficient investment — rather than burdening entrepreneurial activities — and by establishing a stable, predictable regulatory environment that facilitates prudent business planning.

Report and Order re Petition of the Louisiana PSC for Authority Over CMRS. (emphasis added).

Declining to preempt suits like those brought by the Alliance eviscerates all of the goals cited in the Louisiana Order. Large class-action damage awards are not "positive incentive"-based regulation. The randomness of jury awards is not a stable environment, and state-by-state, county-by-county, jury-by-jury setting of standards for various carrier practices is far from predictable. Finally, the Petition of the Alliance has failed to show a "clear-cut need" for damage awards. Indeed, the Alliance has made no effort to demonstrate why the FCC complaint process or state court

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[4] This is particularly true as the distinction between the Internet, wireless telephony, and information services continues to blur in the face of rapid convergence. As the Fourth Annual Report noted, wireless data or voice/data services is growing, and new handsets with micro-browsers will turn many customers' wireless phones into e-mail and Internet devices. This is yet another reason to protect the innovative but still fragile CMRS market from the burdens the Alliance seeks to impose.

injunctive relief would not suffice. This is a showing the Alliance cannot make: either of these options (and likely many others) would be more faithful to the regulatory guidelines of Congress and the Commission than would money damages in class action lawsuits.

B. The State-by-State Balkanization of Regulations on a Technology that Inherently Knows No Geographic Boundaries Would Drastically Diminish the Growth, Innovation and Economic Impact of the Wireless Marketplace

It is difficult to imagine a worse outcome for the wireless industry, its customers, its technology and market partners, and its investors than for states and individuals to be encouraged to set their own wireless policies based on their own disparate agendas. Among communications technologies, mobile wireless is unique in that it is inherently borderless. Narrowband and broadband landline communications, including cable, all have a fixed termination point. It is possible, even though it may not be advisable, to regulate service to customers of such providers on the basis of geography. With mobile wireless service, however, the recipient of the service is moving, and can freely cross geographic boundaries. Whether by radio contact with their wireless service provider's transmission tower, or by way of a roaming arrangement, the customer's wireless service — and all of the terms of that service — follow the customer across cities, counties, and states.

As a result, not only does state and local regulation of wireless service have little logical foundation, it is also inefficient and impractical for carriers. If all 50 states have different rules, regulations, and standards, there are enormous costs to tracking and meeting all of those differences — assuming they can be harmonized at all. The problems caused by such an approach are exacerbated as the wireless marketplace moves towards increasing use of nationwide or multi-state flat rate plans, making CMRS truly a creature of the national economy. In such a market, damage

awards in one state may impact pricing and costs throughout the area covered by a plan — even though other states in that plan area may not have the same trade-restrictive laws.

The magnitude of the "blank check" the Alliance seeks is easy to see. In addition to the specific issues in the L.A. Cellular case itself, the ruling the Alliance has asked for would reach dozens of other issues as well, issues that have yet to be fully developed before the Commission. For example, some states have expressed a belief that their state "home solicitation" or "cooling off" laws apply to sales of wireless service packages. U.S. Cellular proactively made the significant investment to survey the analogous laws in all states in which it operates. Virtually no two are alike. Required notices are different, which would require a different contract in each state, a costly and administratively burdensome solution. In some states, CMRS is unambiguously exempted. In others, there appears to be no exemption. In others, there is frustrating ambiguity. In many, if not most, states, including West Virginia, the "cooling off" law does not provide a complete answer. A carrier also has to look to the interaction between state cooling off law and other consumer protection laws, and perhaps the federal cooling off law, which is often discussed by reference in state laws.[5]

The Alliance seeks to further complicate this scenario in at least two ways. First, the Alliance wants CMRS to be burdened not only by such disparate state standards, but by the capriciousness of endlessly inventive private causes of action as well. Second, the Alliance wants

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[5] If there is any doubt that money damages under such "cooling off" laws and many other similar state consumer laws should be preempted, it is telling that the Federal Trade Commission Act exempts common carriers from its coverage. Although many of the state laws were modeled after the FTC Act, some do not have the common carrier exemption. The Congressional choice to make such an exemption, however, suggests that Congress believed common carriers are adequately overseen by the FCC, and that multiple layers of redundant regulation were undesirable.

these confusing traps for the unwary, many of which were drafted before CMRS existed and which are ambiguous as to CMRS, to be triggers for onerous money damages.[6] The uncertainty and cost of such a scenario would surely stifle the success of the wireless industry and the success of the policies of the Commission that have nurtured the industry's growth.

C. Contrary to the Alliance's Argument the Basic, Time-Tested Policy Considerations Behind the Filed Tariff Doctrine Remain Vital in Analyzing Regulations on the Wireless Marketplace

One of the significant, recurring policy arguments in CMRS preemption cases is the role of the Filed Tariff Doctrine. This policy argument is central to the Alliance Petition and the underlying L.A. Cellular case, as well as the Tenore case which dominates the Alliance's exhibits. The trial court in the L.A. Cellular case ruled against the Alliance in part on the basis of the Filed Tariff Doctrine. The Alliance now claims that the doctrine has no relevance because the Commission has decided to forbear from requiring mobile wireless providers to file tariffs.[7] The Alliance takes far too narrow of a view.

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[6] Not only are such laws "traps for the unwary," in many states the consumer laws are so broad as to reach wholly innocent conduct. Many such laws by their express terms have no intent requirements, no reliance requirements, and are worded so broadly as to give states almost limitless discretion to pick and choose their targets.

[7] The Alliance argument suffers two deficiencies on this point. First, the Commission retains the authority to require tariffs. The decision to use the marketplace as a regulatory mechanism rather than a specific tariff was a deliberate decision pursuant to the Commission's tariff authority. This decision to require no tariff should be shown as much deference — arguably by use of the Filed Tariff Doctrine's preemptive effect — as a specific tariff requirement. Imagine a rule requiring CMRS providers to file a tariff with little more than the carrier's name and address. It would have the same result as forbearance from a tariff requirement, but would arguably trigger the Filed Tariff Doctrine. Second, the Alliance supports its argument here by suggesting that the relief from tariff filings means CMRS providers are no different than any other business (giving as an example a dry cleaner). The analogy fails, however, because unlike dry cleaners, CMRS providers are common carriers, in some states have been considered public utilities, and compete directly with regulated entities who benefit from the Filed Tariff Doctrine.

While the absence of filed tariffs may mean the doctrine is not automatically applicable, a review of the policy interests behind the Filed Tariff Doctrine demonstrates that the doctrine still remains alive and compelling in the CMRS arena. The fundamental interests of the Filed Tariff Doctrine are non-discrimination, certainty and stability, and the primacy of the expert agency (in this case, the FCC).[8] Non-discrimination and stability remain the stated policy goals of the Commission, and relying on the expertise of the Commission as opposed to non-expert lawyers and courts, is crucial for the policy of non-regulation to succeed.[9]

1. The Valid Policy Interest in Nondiscrimination is Still Best Served by Preemption of Money Damage Awards

Going back to the "cooling off" example, imagine two neighbors who become mobile wireless customers on the same day. They subscribe with the same carrier, on the same service plan, and have identical calling habits. The only difference is that Bob signed up through a home solicitation which, unfortunately, did not use the precise language required for the "cooling off" period notice. Betty, on the other hand, went to the retail outlet a few blocks away and signed up there. After they have each used 10,000 minutes, they have each paid total bills of $1,000. At that point, however, a court determines that because the carrier's home solicitation notices were only in

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[8] MCI Telecommunications Corp. v. AT&T, 512 U.S. 218, 230 (1994)(doctrine "essential to preventing price discrimination and stabilizing rates" [citations omitted]); Fax Telecommunicaciones, Inc. v. AT&T, 138 F.3d 479, 489 (2d Cir. 1998)(citing two key principles of doctrine as nondiscrimination and preserving "the exclusive role of federal agencies in approving rates for telecommunications services"); Marcus v. AT&T Corp., 138 F.3d 46, 58 (2d Cir. 1998)(same).

[9] The nondiscrimination issue alone strongly suggests that the Filed Tariff Doctrine remains alive: the Commission is prohibited by statute from waiving the nondiscrimination requirements. As regulation of discriminatory charges and practices remains in full effect, even in the absence of tariffs, the doctrine which was created to implement the common carrier nondiscrimination policy should also exist in the absence of tariffs.

partial conformity with the statute, the carrier is "fined" $200 for each subscriber who signed up through a home solicitation, to be returned to the subscriber. Betty's net average per minute rate is 10-cents per minute. Bob — who in every respect that is relevant to their mobile wireless service is similarly situated — now has a net per minute rate of only 8-cents per minute. It is easy to see how failure to preempt money damage awards can result in arbitrary, uncontrolled discrimination among customers' ultimate rates, even where the underlying substance of the "complaint" is not facially rate-related. And there is an entire spectrum of other issues that the Alliance's requested ruling would impact that are even more directly related to "rates" — rounding and time-calculation, billing practices, interest rates on late payments, and many shoe-horned "fraud" claims.[10]

The result would also be discrimination among and between jurisdictions. While preemption provides uniformity, failure to preempt means that, for example, L. A. Cellular's mobile wireless customers in Los Angeles may get money back (which, as demonstrated above, lowers the net per-minute rate paid for service), while the same carrier's customers a few miles away do not, or a different carrier's Los Angeles customers who receive substantially similar coverage information may not. This per-minute rate reduction becomes, in essence, a "litigation bonus." The distinguishing characteristic of the class in whose favor the discrimination occurs is that they had an aggressive lawyer. Worse still, the discrimination has the potential to be even more capricious. Even within a single county, two customers of the same carrier could bring suits seeking individual money damages. One may find a sympathetic jury, the other may not. Not only is the result

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[10] A traditional measure of fraud damages in the consumer arena is the value of the goods or services as represented less the value actually received. Such a calculation in the wireless communications context is simply a formula for calculating an appropriate rate: what should the carrier have charged given the service provided. As such, damages based on that and similar theories is directly in conflict with § 332(c)(3).

extraordinarily discriminatory between customers, but in such a situation what guidance does the carrier get going forward? None. Only limitless exposure to damages.

Finally, the result of allowing random damage awards is discrimination and competitive distortion among mobile wireless carriers and between CMRS and other telecommunications providers. Some carriers may have a majority of their licenses in states with harshly anti-business laws, or juries known for large awards. Others may have a majority of their territories in states with very business-protective laws, or frugal juries. There is no logic, and no interest in federal telecommunications policy, which justifies the difference each of those carriers would face in succeeding in business.

Perhaps the strongest reason to maintain the essence of the Filed Rate Doctrine in dealing with mobile wireless, however, is that in a very real sense traditional landline service remains a source of competition for "telecommunications minutes of use." CMRS' landline competitors do not face the limitless exposure or patchwork results inherent in allowing individual courts to award money damages. If groups like the Alliance are allowed to vigorously pursue their goal of using litigation as a lever over public policy, it will become a significant competitive disadvantage vis-a-vis landline carriers.

2. The Filed Tariff Doctrine's Emphasis on Certainty and Stability Remains an Important Policy Which is Best Served by Preempting Money Damage Awards

The Commission has often stated that part of its plan for development of wireless communications is to create a positive climate for investment. As the Commission has correctly noted, among the keys to encouraging investment are stability and predictability. Regulation by litigation — or even state positive law enactments — results in a pastiche of inconsistent rules and approaches. Worse yet is that these local regulations can change from legislative session to

legislative session, or even lawsuit to lawsuit. In such an environment, stability will not be achieved for years, when local cases or rules have been fully appealed to the state supreme courts, and ultimately, to the United States Supreme Court. By then, millions of dollars will have been spent with little consumer benefit to show for it.

Compare, for example, the development of the wireless marketplace since 1996 with the development of the local exchange marketplace over the same period. There has been relatively little litigation involving wireless (other than very discrete tower siting issues). In local competition, on the other hand, core policy issues have been litigated and re-litigated all the way to the Supreme Court — and there remains very little true local competition. There is little question which approach has generated better results to date. The Commission should take all steps necessary to keep the Alliance from imposing the litigation-based local exchange development model onto the more successful non-regulatory wireless development model.

A disorderly, litigation-based or otherwise non-uniform approach will also severely distort carrier investment decisions. Rather than being able to maintain a strategic business plan or provide predictability for investors, carriers will have to deploy resources reactively based on the latest headline-grabbing lawsuit. When a carrier is trying to improve the services offered by rolling out new digital technologies, a sudden rash of coverage suits may require rushing older technologies wastefully into service to eliminate gaps. When a carrier is trying to prevent such suits by putting all of its resources into coverage, a spate of 911 related suits may force a sudden shift of resources into the carrier's 911 technology. Unfortunately, carriers do not have unlimited resources. If the FCC does not preempt such a scenario, mobile wireless providers will lose the ability to rationally plan their investments, and in turn will be less favored by investors in the capital markets. This is

clearly contrary to the Commission's stated goals, and requires that the Commission preempt state regulation of the kind at issue in L.A. Cellular.

3. The Importance of Leaving Key Policy Decisions to the FCC is Not Diminished by the Absence of Filed Tariffs, and Maintaining Such Primacy at the Commission Level is Critical to the Continued Success of the Commission's Policy Toward CMRS

A third key policy of the Filed Tariff Doctrine is to respect the decisions of the expert agency. This policy is just as for CMRS as for utilities who still file tariffs. In their treatment of wireless technologies, Congress and the Commission made a very deliberate decision to take a different approach than had been taken with other telecommunications services. With wireless, Congress and the Commission determined to use a very careful mix of moderate regulation and a broad reliance on market factors to develop the CMRS industry, infrastructure, and customer base. Congress and the Commission, having determined that the market was the optimal mechanism to promote and build CMRS, then stressed a non-regulatory approach, and took affirmative steps to help prime the market engine (for example, in the Commission's approach to providing spectrum).

To see the magnitude of Congress and the Commission's determination to keep CMRS free from regulation, one need only look to the tough tests that must be met for a state to re-regulate CMRS rates and entry. See, e.g., Second CMRS Report and Order ¶251-252. It would be an absurd result if states attempting to follow the prescribed process had to meet the appropriately strict tests to determine if utility-type regulation is truly necessary, yet state consumer protection divisions and private trial attorneys could easily circumvent those tests by simply bringing lawsuits through the back door of tort and consumer protection laws. Such lawsuits would have every bit as much of a regulatory impact on the wireless marketplace, yet could be maintained without any of the proof of

necessity required under ¶ 252. This gaping loophole would swallow the general rule of 47 U.S.C. § 332(c)(3)(B), requiring states to petition for the authority to regulate CMRS.

It is important to note that while the non-regulation policy is a strong policy, it was not arrived at lightly. Just as the tests for states to re-regulate are difficult to meet, the tests for the Commission to forbear from regulation and turn wireless over to the marketplace are substantial. This decision having been carefully made by the entity with the most expertise in the field, states — and certainly individual courts — should not be permitted to "second guess" the Commission's decision. The purpose behind the Commission's "non-regulatory" policy was to free CMRS from the shackles of arbitrary and political restrictions. This policy is wholly undermined if CMRS providers merely traded careful, balanced, uniform, expert regulation by the FCC for uninformed, unbounded, unpredictable regulation by states, lawyers, and courts. The carriers are actually worse off, not better. It is unthinkable that the FCC really intended to move CMRS out of the regulatory frying pan and into the regulatory fire. Yet, this is the outcome the Alliance openly seeks.

As contrary to the Commission's goals as state laws and rules are, lawsuits are far worse. Indeed, if there are concerns about practices of the wireless industry, lawsuits are the least appropriate way to resolve them. Everything about litigation runs contrary to the expressed goals of Congress and the Commission. In litigation, there is no certainty, no uniformity, no predictability.

With an FCC process on the other hand, such as the complaint process, or the decisions to forbear from certain regulations on CMRS, decisions impacting wireless services are looked at by decision-makers who understand the economics of the industry, its history and development, and how it fits into the broader mosaic of communications and information services. In such processes, wireless carriers have a voice, and a chance to argue facts unique to the industry and public policy

concerns. The process is both procedurally balanced, and is substantively balanced between the needs of consumers, competitors, carriers, and Commission objectives. Prosecutors, plaintiff's attorneys, judges and juries are not bound by such considerations — and often operate without knowledge of, for example, unique aspects of the economics of CMRS, how the national economy will be impacted, or the entirety of federal communications policy. These entities role is to promote the narrow state agenda, without regard to the broader implications. Allowing expert regulation to be replaced by deliberate non-regulation has worked well and is a legitimate choice. Allowing expert regulation to be replaced by uninformed regulation is a counterproductive recipe for disaster.

The basic thrust of the L.A. Cellular case, that L.A. Cellular is liable because it had "dead spots" or coverage gaps within its promoted service territory, presents a dramatic example of the need for expertise, and the need to look at a "bigger picture" than lawsuits normally allow. The Alliance's claim that advertising must show with precision the "dead spots" in coverage or it exposes carriers to consumer protection laws and tort claims either evidences the technical naivete that U.S. Cellular is concerned about in non-expert fora, or shows a crass and cynical attempt to create issues to litigate.

First, the FCC should assert, as it has consistently since 1981, that even without reaching the 47 U.S.C. § 332(c)(3) issue of rate and entry regulation, L.A. Cellular's claims are preempted based on the Commission's complete occupation of the field of technical and design standards for CMRS networks. The power, configuration and coverage — including the potential for gaps in that coverage — of a carrier's network are all part of the larger category of "technical standards." The Commission has already asserted

> federal primacy over the areas of technical standards and competitive market structure for cellular service. . . The technical standards set forth in this Report and Order are the minimum standards necessary

> to achieve the desired goals and ***any state requirements adding to or conflicting with them could frustrate federal policy.***

Report and Order, In the Matter of an Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications and Amendment of Parts 2 and 22 of the Commissions Rules Relative to Cellular Communications Systems, 86 FCC 2d 469, 504-505 (1981) (emphasis added).

Second, even if a carrier thought it advisable or desirable to show ***exact*** coverage, it is simply impossible to do. The exact coverage from a transmission site or series of towers is not static. Coverage can depend on the equipment used by the customer, the seasonal density (or lack thereof) of foliage on surrounding trees, the capacity of the system and the possibility that locations normally well served are temporarily experiencing dropped calls due to lack of capacity (or usage "spikes" such as those that commonly occur when there is a traffic accident or severe weather conditions), and various other factors many of which are not within the carriers' control.

If the choice is to be exacting in showing coverage or face monetary liability, many carriers would likely prefer to not have consumer maps at all. This avoids liability, but it certainly is not in the best interest of the consumer, who is better served by knowing the service territory — even in general terms — of the carriers they may choose from. This is, after all, the point of most territory maps: to show rate distinctions. U.S. Cellular's maps and service agreements, for example, specify that uniform coverage is not guaranteed. The purpose of the maps is to show customers rate boundaries they need (and want) to know for things like roaming and toll charges, not to represent the precise radio frequency propagation model from each transmission site in the network.

The Alliance makes a slight attempt to address some of these factors by alleging that wireless service providers simply choose not to make a large enough investment in infrastructure. Aside from ignoring any principles of business planning and operations, this argument is again either naive at

best or cynical at worst. Many — perhaps most — carriers would like to have significantly more infrastructure than they currently have, but have been frustrated by siting difficulties. Customer base growth has strained the capacity of many cell sites faster than local zoning hurdles can be overcome. If the Alliance seeks to hold carriers accountable for having sufficient infrastructure to provide perfect, complete, and unfailing coverage and capacity at all points in a licensed territory, they should be consistent and vigorously advocate total preemption of local zoning authority. It would be profoundly unjust for the FCC to permit damage awards based on inadequate coverage or capacity while control over the infrastructure buildout necessary to avoid such lawsuits remains beyond the carriers' control.

II. THE RELEVANT STATUTES, FCC ORDERS, REGULATIONS, AND CASE LAW PERMIT THE FCC'S POSTURE OF NON-REGULATION TO PREEMPT ATTEMPTS TO REGULATE THROUGH MONEY DAMAGE AWARDS

It is clear that the better policy arguments favor preemption of money damages against mobile wireless carriers. The right policy is not enough, however: the law must permit the implementation of the policy. Fortunately, in the present case, the FCC has ample legal support for declaring money damage awards, like that sought by the Alliance, to be preempted.

The central focus of the preemption analysis in the present matter is 47 U.S.C. § 332(c)(3)(A), entitled "State Preemption," which provides in relevant part:

> (A) Notwithstanding sections 152(b) and 221(b) of this title, ***no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service*** or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services . . . Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that —

> (i) market condition with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory. . .

(emphasis added).

While U.S. Cellular believes the intent of this language is clear, and permits preemption of money damages awards on its face, the language arguably leaves three closely related questions unanswered: (1) are money damage awards for consumer protection or tort lawsuits a form of state regulation of rates; (2) if they are rate regulations, or if they act like rate regulations, what is the scope of the preemption; and (3) which state regulatory or state court actions involve "rates" and which involve "other terms and conditions"? U.S. Cellular demonstrates below that money damage awards are, in fact, a form of state regulation and a form of rate regulation, that the Commission should find that the term "rate" needs to be interpreted broadly to include rate elements and certain indirect impacts on rates, and that accordingly preemption should be broad to best effectuate Commission policy towards CMRS. Ambiguity between rates and "terms and conditions" must be resolved in favor of preemption, and towards remedies that do not change the charges — prospectively or retrospectively — paid by customers.

A. The Terms "Regulation" and "Rates" are Defined Broadly and Unambiguously Encompass Money Damage Awards

It is well settled that lawsuits are as much a form of state regulation as state statutes or administrative rules. "[State] regulation can be as effectively exerted through an award of damages as through some form of preventative relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." San Diego Building and Trades Council v. Garmon, 359 U.S. 236, 247 (1959); see also Cipollone v. Liggett Group, Inc.,

505 U.S. 504, 521-22 (1992)(same result in context of cigarette labeling); International Paper Corp. v. Ouellette, 479 U.S. 481, 496-97 (equating tort law with state regulation in context of clean water regulation). The damage awards the Alliance asks the FCC to condone are, therefore, a form of state regulation which is expressly preempted if it affects rates or entry.

U.S. Cellular has already shown, in Section I.C.1 above, that damage awards inevitably amount to rate setting in the commercial wireless service context. This observation is supported by the recent Supreme Court decision in AT&T v. Central Office Telephone, Inc., where the Court explained:

> The Ninth Circuit thought the filed-rate doctrine inapplicable "[b]ecause this case does not involve rates or ratesetting, but rather involves the provisioning of services and billing." 108 F. 3d, at 990. ***Rates, however, do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as a claim for inadequate services and vice versa.*** "If 'discrimination in charges' does not include non-price features, then the carrier could defeat the broad purpose of the statute by the simple expedient of providing an additional benefit at no additional charge. . . . An unreasonable 'discrimination in charges,' that is, can come in the form of a lower price for an equivalent service or in the form of an enhanced service for an equivalent price." Competitive Telecom-munications Assn. v. FCC , 998 F.2d 1058, 1062 (CADC 1993).

AT&T v. Central Office Telephone, Inc., 118 S. Ct. 1956, 1963 (1998)(emphasis added). This is precisely the issue in the Alliance's coverage-based claims. The Alliance seeks money damages based on allegedly inadequate service. But as the Supreme Court noted, the claim is just as much a claim for excessive rates: the rate charged and the service(s) received are merely two sides of the same coin. Similarly, in the "cooling off" law example above, a "non-price feature" of the transaction — penalties based on its location — creates a "discrimination in charges" contem-plated by the Supreme Court in its broad definition of "rates."

The Commission should follow the Supreme Court's lead and define the term "rates" broadly. On the continuum set forth in § 332(c)(3) between preempted regulation of "rates" or "entry" and permitted regulation of "other terms and conditions," there will be many areas in the middle that are ambiguous or have both rate and non-rate elements. The broad definition courts and this Commission have given to the term "rates," as well as the importance of promoting the policies discussed in Section I above, compel the Commission to resolve any ambiguity in favor of declaring a particular regulation a "rate" regulation.[11]

Even where the substance of a claim does not address rates, that is not the end of the analysis. The remedy sought to address the substantive complaint may still be preempted. This is particularly true as to money damage awards and other rate-related remedies, regardless of the nature of the underlying substantive issue. See Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 578-79 (1981)(state court damage action in effect sought retroactive rate change); Wegoland, Ltd. v. NYNEX Corp., 806 F. Supp. 1112, 1121 (S.D.N.Y. 1992)(damages award preempted as rate setting); Nova Cellular West, Inc. v. AirTouch Cellular of San Diego, slip. op., No. 98-02-036 (Calif. PUC Sept. 3, 1998)(same).

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[11] In addition to AT&T v. Central Office Telephone, see, e.g., Iowa Utils. Bd. v. FCC, 120 F.3d 753, 800 (8th Cir. 1997)(CMRS interconnection pricing solely within Commission's jurisdiction under § 332), aff'd in part and rev'd in part sub nom AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999); Simons v. GTE Mobilnet, Inc., No. H-95-5169, slip. op. (S.D. Tex. Apr. 11, 1996) (claim that early termination penalty is unlawful penalty preempted by § 332); Jones v. Kansas Gas & Elec. Co., 565 P.2d 597, 604 (Kan. 1977)(noting that state usury and consumer credit laws are not appropriate for regulating late charges); Hardy v. Claircom Communications Group, Inc., 937 P.2d 1128, 1133 (Wash. App. Div. 1 1997)(finding that purported advertising claim actually a reasonable rate claim); Moenning v. Illinois Bell Tel. Co., 487 N.E.2d 980, 982-83 (Ill. App. 1st Dist. 1985)(security deposits and credit regulation "fall[] under the area of rate regulation").

B. The Body of Preemption Law Permits, Indeed Favors, the Commission Exercising Preemption Over State Money Damage Claims

As the FCC argued in its brief as amicus curiae to the Ninth Circuit in the AT&T v. City of Portland cable access case, the Commission's preemptive authority is broad and the threshold for when preemption is proper is low. "The Supreme Court has held that even in the absence of express statutory preemption, the FCC may preempt local cable regulations that conflict with federal policy so long as the Commission acts 'within the scope of its congressionally delegated authority.' City of New York, 486 U.S. at 63 (quoting Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 369 (1986))." FCC Amicus Brief at Sect. II. Congress has delegated broad authority to guide the development of the wireless marketplace to the FCC. All regulation of rates and entry have been given to the FCC, the ability to determine when states can and cannot engage in such regulation has been given to the FCC, and the ability to engage in further preemption of state regulation upon petition, as well as myriad technical regulations regarding the provision of wireless services have all been left solely to the FCC. The determination of whether money damages are a form of rate regulation is easily within the delegated authority.

In any event, as U.S. Cellular has explained in Section II.A. above, with respect to the Alliance petition, there is express preemption under the plain language of § 332(c)(3)(A) and the case law defining "rates," and equating damage awards with regulation. If there is any doubt, however, about the scope of the express preemption, the claims made in the L.A. Cellular case must be preempted because they conflict with federal policy set forth by the Commission.

A conflict will be found whenever a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Ouellette, 479 U.S. at 491-92. Congress set out in drafting § 332(c) to "establish a Federal regulatory framework to govern the

offering of all commercial mobile services." H. Conf. Rep. No. 103-213, 490-91, reprinted at 1993 U.S.C.C.A.N. at 1179-80. The Conference Report goes on to state the conferee's intent to "give ***the Commission*** the flexibility to determine whether or not enforcement of [common carrier regulations] is necessary in light of their significance to consumers." Id. (emphasis added). Finally, the Conference Committee intended to give the FCC oversight to protect the "big picture" of communications policy with respect to CMRS:

> It is the intent of the Conferee's that the Commission, in considering the scope, duration, or limitation of any State regulation shall ensure that such regulation is consistent with the overall intent of this subsection as implemented by the Commission . . .

H. Conf. Rep. No. 103-213, 494, reprinted at 1993 U.S.C.C.A.N. at 1183.

Part of the "overall intent" of both Congress and the Commission in implementing CMRS rules has been uniformity and stability. There can be nothing less compatible with this goal than the prospect of not only different requirements in each of the 50 states, but potentially changing goals within each state whenever a new jury is empaneled. See Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc., 959 F.2d 158, 162 (10th Cir. 1992)(discussing preemption under the Federal Insecticide, Fungicide and Rodenticide Act).

Allowing state tort claims not only conflicts with the goals of the Commission with respect to CMRS, but also with the method Congress and the Commission have prescribed for meeting those goals. A state law is preempted if it interferes with the federal methods of implementing federal policy goals. Ouellette, 479 U.S. at 494. As U.S. Cellular has described above, to ensure regulation is truly necessary and not unduly burdensome on CMRS, Congress requires states to petition the FCC for the right to engage in rate regulation. The FCC has, in turn, established a rigorous test to screen out needless regulation. It is unthinkable that Congress would allow lay juries to do on an

ad hoc basis what it will not allow even specialized state PUC's to do without seeking FCC permission first. Ouellette, 479 U.S. at 497 ("It would be extraordinary for Congress, after devising such an elaborate permit system that sets clear standards, to tolerate common-law suits that have the potential to undermine this regulatory structure.") .

The need for federal preemption is particularly striking under a system like the Federal Communications Act, which contains not only detailed standards for common carrier practices (and while many are waived at present, the FCC has the authority to enforce such standards against CMRS providers — they are still contained in the Act), but also includes a system of enforcement. Any suggestion made by the Alliance that preemption leaves consumers without remedies is simply false.

First, Congress expressly gave the FCC direction to consider "consumer protection" and the "public interest" in its forbearance decisions. See 47 U.S.C. § 332(c)(1)(A)(ii)-(iii). Presumably the Commission did consider such factors in deciding which common carrier regulations to suspend. The Alliance petition is little more than a second-guessing of the balance the FCC determined is appropriate, a claim that consumer protection interests are not adequately met by the federal approach. This is a direct attack on a policy decision that Congress expressly left to the FCC, and as such is unquestionably preempted.

Second, consumers have a wide selection of authorized remedies. They can take full advantage of §§ 201, 202 and 208, which require carriers to have reasonable, just, and nondiscriminatory charges and practices, and which provide a complaint process by which the FCC can enforce the requirements. If a state feels the complaint process is not enough, or the FCC is not serving the needs of consumers of that state, the Act allows states to petition for further regulation. Finally, consumers can arguably go to court and seek injunctive relief (so long as such injunctions

do not conflict with federal policy or the implementation of such policy). The only remedy customers do not have is money damages, which is a back-door form of rate regulation (and the FCC can assess monetary penalties, so the carriers are certainly not "off the hook"). In light of this comprehensive remedial scheme authorized by federal law and policy, the field is occupied by the Commission, and attempts by the states to modify this careful framework is preempted.

SUMMARY AND CONCLUSION

Because the Alliance's Petition for Declaratory Ruling will not end the controversy in the L.A. Cellular case, and inappropriately intermingles a request for a broad-brush ruling with facts in a very specific and limited case, the FCC should deny the petition.

If, however, the Commission decides to offer a declaratory ruling, that ruling should — contrary to the Alliance's position — establish the broadest scope of preemption by defining "rates" to include rate elements, indirect impacts on rates, and anything which is a hybrid between a "rate" issue and a "terms and conditions" issue. Such an interpretation best serves the policy goals of Congress and the Commission with regard to CMRS, and fosters stability, fairness, growth and investment free of a needless and burdensome patchwork of regulation. It also sends the correct signal that rampant litigation is not the answer to telecommunications

concerns. Such a conclusion is well supported by preemption law, and in particular the Federal Communications Act, cases thereunder, and the orders and policy pronouncements of this Commission.

Respectfully submitted,

Eva Maria Wohn pc

Eva Maria Wohn
Vice President, External Affairs
U. S. Cellular Corporation
8410 West Bryn Mawr, Suite 700
Chicago, Illinois 60639

Bret A. Dublinske pc

Bret A. Dublinske
Dickinson Mackaman Tyler & Hagen, P.C.
1600 Hub Tower
699 Walnut Street
Des Moines, Iowa 50309
515/246-4546

Peter Connolly

Peter M. Connolly
Koteen & Naftalin, L.L.P.
1150 Connecticut Avenue
Washington, D.C. 20036

CERTIFICATE OF SERVICE

I, Nadine Siler, a secretary in the offices of Koteen & Naftalin, hereby certify that a copy of the foregoing "Motion" and "Comments" to accept late filed comments was served by hand on the following on this 17th day of September, 1999.

Kenneth Hardman, Esq.
Moir & Hardman
1828 L Street, N.W.
Suite 901
Washington, DC 20036

Nadine Siler

Nadine Siler